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Statement

The respondent Mabel Szumski urges denial of the petition for a Writ of Certiorari to review the judgment of the New Jersey Supreme Court entered on January 23, 1967.

Reasons For Opposing The Writ

The unanimous opinion of the New Jersey Supreme Court presents a complete analytical and historical review of the jurisdictional issue involved herein. The reasons upon which its conclusions were grounded are so thoroughly documented by authoritative decisions, we suggest we can add little which would be of further assistance to this court; thus we beg leave to rely upon the opinion of the court below and upon a fuller discussion of this problem in its unanimous decision in the companion case of *Hansen* v. *Perth Amboy Drydock*, 48 N. J. 389, 226 Atl. 2d 4 (Sup. Ct. of N. J. Jan. 23, 1967).

One of the essential reasons assigned by the court for its conclusions at bar was stated as follows:

> "Respondent has not suggested to us any material prejudice to the national maritime interest which might be caused by the application of our State remedy."

Despite this reference and the admonitory inference inherent in it, the petitioner still presents no facts nor offers any argument indicating any material prejudice to the characteristic features of the general maritime law or interference with the proper harmony or the uniformity of that law in its international or interstate relations.

Since the New Jersey Supreme Court has already determined there is no evidence sufficient to maintain the assertion there is such material prejudice, this factual conclusion should not be disturbed.

When Congress enacted the Longshoremen's and Harborworker's Act, 33 U.S.C.A. §§901-950 and provided

> "Compensation shall be payable under this chapter in respect of a disability . . . of an employee, but only if the disability . . . results from an injury occurring upon the navigable waters of the United States (including any dry dock) *and if the recovery for disability . . . through workmen's compensation proceedings may not validly be provided by State Law. . .*"

it clearly indicated its intention and approval that recovery for injuries on navigable waters of the United States, could be validly provided by State law.

Despite some early doubts concerning the delegation of authority by Congress to the States, to enact legislation for compensation to workmen whose injuries occurred on navigable waters, this Court enunciated, approved and adopted what came to be known as the "twilight zone" doctrine.

This included not only the specific locale of an accident but the nature of the work done; thus where an injured workmen's duties were primarily of local concern and not directly involved with commerce on navigable waters, recovery for compensation under the provisions of the individual State acts, was approved.

This demonstrated the Court's intention to insure a forum for recovery by injured workmen in what frequently appeared to be a questionable area concerning Federal or State jurisdiction.

The New Jersey Supreme Court concurring with the courts of last resort of many other jurisdictions and with

decisions of this Court, cautioned that we should not confuse "the availability of Federal jurisdiction with its exclusiveness."

If we hold simply because an accident occurs on navigable waters, that all States are precluded from promulgating any legislation in connection therewith, it would frustrate, nullify and render meaningless the expressed Congressional intention of the Longshoremen and Harborworker's Act, 33 U.S.C. §§901-950. Section 3 (a) of the Act, 33 U.S.C. §903 (a) reads:

> "(a) Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) *and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law.*"

These provisions should be accorded meaningful interpretation and effective implementation.

In *Calbeck* v. *Travelers Insurance Co.*, 370 U. S. 114, 82 S. Ct. 1196 (1962) the Court held:

> "We turn finally to a question raised only in Donovan v. Avondale Shipyards. The employer contends that the employee accepted benefits under the Louisiana State Compensation Act and that this constitutes an election of remedies which bars prosecution of his claim under the Longshoremen's Act. Compensa- Act without a prior administrative proceeding. Before the federal claim was filed Avondale made payments to the employee for some two years and three months at the maximum rate provided by the Louisi-

ana statute. The employee accepted the checks which bore a notation on their face that they were payments of compensation under the state act. In addition Avondale advanced a substantial sum to the employee to be credited against future compensation payments. Avondale also paid medical expenses for the employee's account in excess of the maximum liability imposed by the Louisiana statute. In the compensation order entered by Deputy Commissioner Donovan under the Longshoremen's Act the full amount of all payments made by the employer was credited against the award, and no impermissible double recovery is possible. We hold that *the acceptance of the payments does not constitute an election of the remedy under state law* precluding recovery under the Longshoremen's Act. Nothing in the statute requires a contrary result. And we agree that *the circumstances do not support a finding of a binding election to look solely to the state law for recovery. Massachusetts Bonding & Insurance Co.* v. *Lawson,* 149 F. 2d 853; *Newport News Shipbuilding & Dry Dock Co.* v. *O'Hearne,* 192 F. 2d 968; *Western Boat Building Co.* v. *O'Leary,* 198 F. 2d 409."

The foregoing recognized and approved an election of remedies provided by the Federal and State jurisdictions; if the Federal remedy was exclusive and State jurisdiction pre-empted, there could be no such election.

The United States Constitution, Article III, §2 provides:

"The judicial power (of the United States) *shall extend* . . . to all Cases of admiralty and maritime Jurisdiction . . ."

Nothing contained therein expressly limits such jurisdiction to the Federal Courts; it makes no provision that such jurisdiction shall be exclusive nor denies to the individual States the authority to enact effective jurisdictional legislation.

In short while the Federal judicial power *extends* to all cases of admiralty and maritime jurisdiction, it doesn't usurp it.

This, in view of the approval by the United States Supreme Court of the "twilight zone" doctrine as enunciated in *Davis* v. *Department of Labor & Industries,* 317 U. S. 249, 63 S. Ct. 225 (1942) fortifies our contention that while nothing provided by any State law may impair, infringe or curtail the authority of the Federal courts, to exercise its judicial power in all cases of admiralty or maritime jurisdiction, where such jurisdiction is invoked, the States are not pre-empted from providing compatible remedies.

If *arguendo* it be contended the respondent's remedy is governed solely by the Longshoremen and Harborworker's Act *supra,* we submit her husband, the late Anthony Szumski was precluded from its provisions.

Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§901-950; 33 U.S.C. §903(a):

> "(a) Compensation shall be payable under this chapter in respect to disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law. No compensation shall be payable in respect to the disability or death of

(1) A master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net; or

(2) Any officer or employee of the United States or any agency thereof or of any State or foreign government or of any political subdivision thereof."

Szumski was never hired to load or unload any vessel over eighteen tons. Indeed he did no loading or unloading at all, and if his attempt to start the motor which stalled constituted *repairs* then clearly he was repairing a "small vessel under eighteen tons net" (see Exhibit R-1 (156a)).

If the Longshoremen and Harborworker's Act by its expressed provisions excluded Szumski from its application and the State Compensation Laws may not be invoked, the respondents would find themselves in that very vacuum which the United States Supreme Court and Congress intended should not exist.

CONCLUSION

For the reasons hereinabove stated and upon the authority of the decision cited by the New Jersey Supreme Court in its companion case, *Hansen* v. *Perth Amboy Dry Dock Co., supra*, we urge this court to deny the petition for Writ of Certiorari.

Respectfully submitted,

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